

**United States Department of Labor
Employees' Compensation Appeals Board**

D.W., Appellant

and

**U.S. POSTAL SERVICE, METROPLEX
FACILITY, Pontiac, MI, Employer**

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**Docket No. 15-434
Issued: April 14, 2015**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 18, 2014 appellant filed a timely appeal from an October 21, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days have elapsed between the issuance of the last merit decision on this matter on July 31, 2013 and the filing of this appeal on December 18, 2014 and pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction only over the nonmerit issue in this case.²

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits on the grounds that the request was untimely filed and failed to establish clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

² See 20 C.F.R. § 501.3(e); *see also R.R.*, Docket No. 14-151 (issued March 25, 2014).

On appeal, appellant contends that her reconsideration request was timely filed. She also made arguments concerning the merits of her case.

FACTUAL HISTORY

On March 13, 2012 appellant, then a 47-year-old mail handler, filed a traumatic injury claim alleging that on January 6, 2012 she was raising the trailer door to unload mail, and the door jammed. She alleged injuries to her lower middle back and pelvic-hip area. On January 3, 2013 OWCP accepted appellant's claim for closed subluxation lumbar vertebra (L5) and closed subluxation thoracic vertebra (T8, T9). However, in another decision of January 3, 2013, it denied appellant's claim for continuation of pay for the period January 7 through February 20, 2012. OWCP found that the claim for injury had not been reported on an approved form within 30 days of the injury. It noted that the date of injury was January 6, 2012, but that the CA-1 form was not filed until March 23, 2012. By decision dated July 31, 2013, an OWCP hearing representative affirmed the January 3, 2013 decision denying appellant's claim for continuation of pay.

By letter received by OWCP on August 8, 2014, appellant filed a request for reconsideration. She contended that her injury occurred on January 6, 2012 and that her leave forms indicate that she was on unscheduled leave without pay or unscheduled annual leave from January 10 until March 2, 2012. Appellant asserted that her period of leave was due to her on-the-job injury and that both she and her supervisor believed that all of the needed correspondence and information had been supplied. In support of her argument that her leave was related to her employment injury, appellant submitted time analysis forms and an employee key indicators report. She also submitted a witness statement about the incident of January 6, 2012.

By decision dated October 21, 2014, OWCP denied appellant's reconsideration request as it was not timely filed and did not demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.³ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁴ The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board.⁵

³ 20 C.F.R. § 10.607(a).

⁴ 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁵ *D.G.*, 59 ECAB 455 (2008); *see also C.J.*, Docket No. 12-1570 (issued January 16, 2013).

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁶ OWCP regulations and procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁸ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹² To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP decision.¹³

ANALYSIS

OWCP accepted appellant's claim for closed subluxation lumbar vertebra (L5) and closed subluxation thoracic vertebra (T8, T9). However, in a decision dated January 3, 2013, OWCP denied appellant's claim for continuation of pay. The decision was affirmed by an OWCP hearing representative on July 31, 2013. The July 31, 2013 decision was the last merit decision in this case. The only issue before the Board on this appeal is that of whether OWCP

⁶ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁷ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5a (October 2011). OWCP procedures further provide that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error. *Id.* at Chapter 2.1602.3c.

⁸ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁹ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁰ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹¹ See *Leona D. Travis*, *supra* note 9.

¹² See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹³ *Leon D. Faidley, Jr.*, *supra* note 4.

properly declined to review appellant's case on the merits because it was not timely filed and did not establish clear evidence of error.

The Board finds that appellant's request for reconsideration was untimely filed. Section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision from which review is sought.¹⁴ Appellant's application for reconsideration was not received by OWCP until August 8, 2014.¹⁵ Accordingly, her application for reconsideration was untimely.

The Board also finds that appellant failed to establish clear evidence of error. OWCP denied her claim for continuation of pay for the reason that her claim for a traumatic injury, filed on March 13, 2012, was not filed within 30 days of the date of her January 6, 2012 injury, as required for continuation of pay. In requesting reconsideration, appellant argued that she took unscheduled leave from January 10 through March 2, 2012, and that her time analysis form, signed by her supervisor, indicated that she took time off for the employment injury. She also submitted a witness statement describing her employment accident.

The arguments and evidence appellant submitted in support of her request for reconsideration do not address the pertinent issue. She must show that she filed her traumatic injury claim within 30 days of the accepted employment incident. As stated by OWCP, FECA's implementing regulations provide, in pertinent part, that to be eligible for continuation of pay, a claimant must file a Form CA-1 within 30 days of the date of his or her traumatic injury.¹⁶ There is no provision in the law for excusing an employee's failure to file a claim within 30 days of the employment injury.¹⁷ Appellant's explanations for her late filing and her contention that the time she took following the injury was related to the injury, are not relevant.

The Board notes that the denial of continuation of pay does not affect appellant's entitlement to other monetary compensation benefits. Appellant may pursue a claim for wage loss, as distinguished from continuation of pay, for any disability or period of wage loss caused by the accepted employment injury with the submission of a Form CA-7.¹⁸

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's cases for further review of the merits on the grounds that the request was untimely filed and failed to establish clear evidence of error.

¹⁴ *Id.* at §10.607(a).

¹⁵ Appellant correctly notes that in its October 21, 2014 decision, OWCP incorrectly states that appellant's letter requesting reconsideration was received on "August 0, 2014." The record reflects that appellant's letter was received by OWCP on August 8, 2014.

¹⁶ 20 C.F.R. § 10.205(a)(1)-(3); *see also Carol A. Lyles*, 57 ECAB 265 (2005).

¹⁷ *Dodge Osborne*, 44 ECAB 849, 855 (1993); *see also H.S.*, Docket No. 13-519 (issued September 12, 2013).

¹⁸ *S.K.*, Docket No. 14-509 (issued June 3, 2014).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 21, 2014 is affirmed.

Issued: April 14, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board